No. 12337.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, THE CITY OF LOS ANGELES, a municipal corporation,

Appellants,

vs.

THE DEONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Appellee.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

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APPELLANTS' OPENING BRIEF.

I.

Statement of Jurisdiction.

The statutory provisions sustaining the jurisdiction of the District Court of the United States, in and for the Southern District of California, Central Division, are found in 28 U. S. C. 1332.

The complaint alleges, the answer admits and the District Court found that the plaintiff and appellee is a corporation, incorporated under the laws of the State of New Jersey, having its principal office in Paterson, New Jersey; that the defendant and appellant Department of Water and Power of the City of Los Angeles is a department of the defendant and appellant The City of Los Angeles, a

municipal corporation, organized and existing under and by virtue of the laws of the State of California, and both have their principal office in Los Angeles, California, and both are citizens of the State of California; and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. [T. of R. pp. 2, 3, 9, 79-80.]

The statutory provisions sustaining the jurisdiction of this Court to review the District Court's judgment are found in 28 U. S. C. 1291 and 1294. This judgment is not one in which a direct appeal may be had in the Supreme Court under 28 U. S. C. 1252.

The District Court, after trial on the issues, made its Findings of Fact and Conclusions of Law and entered its Judgment that the plaintiff and appellee have and recover from the defendants and appellants the sum of $9,996.69, together with interests and costs. [T. of R., pp. 78-96.] This is an appeal from that judgment which constituted a final decision of the District Court.

II.

Statement of the Case.

The Department of Water and Power of The City of Los Angeles, hereinafter referred to as the "Department", advertised for sealed bids for the furnishing and delivery of paper-insulated lead covered cable.

The Okonite-Callender Cable Company, Incorporated, a corporation, hereinafter called "appellee", submitted its signed, sealed proposal, with its affidavit of noncollusion and bidder's bond, proposing to furnish six of the sixteen items of cable.

Appellee was awarded a contract dated May 21, 1946, for the furnishing of the six items of cable for $91,096.00,

and other bidders were awarded contracts for the remaining ten items. Appellee furnished and delivered all of the material in accordance with the terms of the contract.

The contract contained a Price Adjustment Clause providing that the contract price of $91,096 was to be subject to adjustment for changes in labor and material costs. Labor costs are not involved in this case.

The Department has paid appellee the full unadjusted contract price of $91,096.00. It has also paid $1,392.85 agreed by both parties to be the amount due under the contract Price Adjustment Clause for labor costs. It has paid $4,205.84, under the Price Adjustment Clause, on account of changes in material costs, making a total payment of $96,694.33, plus taxes, and contends that constitutes payment in full.

For the purpose of adjustment, the portion of the contract price representing material was stated to be 50 per cent or $45,548.00. This amount was to be adjusted for increases in material costs. The adjustment was "to be based on the index of wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the U. S. Department of Labor." [T. of R. pp. 12-13, 33, 85; Defts. Ex. A, p. 11.] The average of the monthly index figures for April, 1946, to and including the month specified for final shipment, was to be computed and the percentage of increase, if any, was to be secured by a comparison of such average monthly material index figure with the material index figure for April, 1946. The adjustment for increases in material was to be obtained by

applying such percentage of increase to $45,548.00 and the result was to be accepted as an increase in the contract price.

An "Index of Wholesale Prices" was "compiled monthly by the U. S. Department of Labor," entitled "Average Wholesale Prices and Index Numbers of Individual Commodities" for April, 1946, through March, 1947. [Pltf. Ex. 1.] These tables showed the average wholesale price and index number for each of more than 850 commodities used in constructing the wholesale price index, and also showed the index numbers of wholesale prices by groups and subgroups for the period. After stating the index figure for "All Commodities," the table is divided into ten major groups of commodities, the sixth one of which is entitled "Metals and Metal Products."

The appellants computed the price adjustment for materials based on the index figure for this sixth group, "Metals and Metal Products." This amounted to $4,205.48, which has been paid. Appellants contended in the District Court and contend here that this was the "Index of Wholesale Prices for 'Group VI—Metals and Metal Products' " and that nothing is due, owing and unpaid to appellee.

Each of these ten major groups of commodities in the table was divided into subgroups of commodities. The sixth of these ten major groups, "Metals and Metal Products," was divided into five subgroups. One of these subgroups is entitled "Nonferrous Metals." Two of the commodities included in this subgroup of "nonferrous

metals" are "Copper, electrolytic, delivered Connecticut Valley," and "Lead, pig, desilverized, f. o. b. New York."

The trial court found in effect that the index figures for these *two* commodities in a subgroup of the sixth group was the "Index of Wholesale Prices for 'Group VI —Metals and Metal Products' " referred to in the contract and that the mathematical average of the two index figures was to be used to obtain a percentage figure. This percentage of $45,548.00, less payments made, is the amount of the judgment, $9,996.69.

Appellee, as plaintiff, brought this action against appellants, as defendants, to recover the sum of $9,996.90, with interest at seven per cent per annum from March 1, 1947, until paid.

Appellants answered denying additional liability under the contract.

The action was tried; Findings of Fact and Conclusions of Law made and entered, and Judgment that plaintiff and appellee have and recover $9,996.69, with interest at seven per cent per annum from May 1, 1947, from defendants and appellants was made and entered. Appellants filed their Motion for a New Trial; Setting Aside and Amending Findings of Fact and Conclusions of Law; and Altering and Amending, and Vacating and Setting Aside Judgment, and Points and Authorities in Support Thereof. The District Court denied appellants' motions. Appellants filed a timely Notice of Appeal to this Court from the final judgment entered in this action March 15, 1949.

III.

Specifications of Error.

1. The Court erred in making its Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16 and 17 [T. of R. pp. 87-93] and its Conclusions of Law [T. of R. pp. 93-94] that the Price Adjustment Clause in the contract was intended to refer to and requires a reference to and use of the *individual* commodity index numbers of copper and of lead in said "Average Wholesale Prices and Index Numbers of Individual Commodities," as published monthly in mimeographed form by the U. S. Department of Labor, Bureau of Labor Statistics, at Washington, D. C., from and including April, 1946, to and including March, 1947, and that said clause does not refer to, and was not intended to refer to, any index numbers of "Metals and Metal Products" as a *group* or *subgroup* in said publications, for the reason that those Findings of Fact and Conclusions of Law are clearly erroneous, the evidence being without conflict and insufficient to support them.

2. The Court erred in making its Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16 and 17 for the reason that they are clearly erroneous, being contrary to the facts as shown by all the evidence.

3. The Court erred in making its Judgment in favor of appellee for the reason that the evidence is without conflict and insufficient to support the Judgment, which is against the evidence and therefore clearly erroneous.

4. It was error for the trial court to admit the testimony of Mr. Metz, a witness for the plaintiff, and to deny appellants' motion to strike said testimony as follows:

(1) That he had occasion to make a calculation of the lead and copper compared with other material involved in

the contract. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: We object upon the ground the question is immaterial.

The Court: It is merely preliminary.

Mr. Jarvis: We think it is irrelevant and immaterial. The contract speaks for itself. It is not necessary to resort to extrinsic evidence to determine the meaning.

The Court: Overruled." [T. of R. p. 109.]

(2) That the cost of copper and lead was 90 per cent of the cost of all material used in the cable. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: I object to this question upon the same ground previously stated. Also upon the ground that the cost is indefinite as to the cost to whom, and based upon what cost.

* * * * * * * *

Mr. Prince: I will stipulate that the same objection may be made to all of this testimony.

Mr. Jarvis: I would like to renew my objection.

The Court: The objection is overruled." [T. of R. pp. 109, 110.]

(3) That when this contract was entered into in May, appellee did not have on hand a sufficient quantity of copper and lead to cover this contract. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: We ask that the answer go out. We have the same objection, that it is irrelevant and immaterial.

The Court: I will hear the evidence on the subject. I think the factual basis is very limited." [T. of R. p. 110.]

(4) That appellee did not have sufficient copper and lead on hand to meet the requirements of this contract at the time the bids were put in or at the time the contract was entered into in May, 1946, and that copper and lead at that time were controlled by the Government and one was only permitted to have what copper and lead one could use for his production in the following month, resulting in appellee's having to purchase from time to time its copper and lead requirements. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: Same objection.

The Court: Overruled." [T. of R. p. 111.]

(5) That the approximate amount for copper and lead that appellee had to pay over and above April and May quotations for copper and lead, and that the actual cost of the copper and lead over April prices and the amount of the increase of copper and lead material was about $24,000. Appellants' objection to this evidence was as follows:

"Mr. Jarvis: I would say that may be out of order, your Honor. In the orderly procedure we should have the contract in evidence and introduced for the court to determine whether it is material for the court to hear this type of evidence.

(Discussion.)

"The Court: Overruled." [T. of R., p. 111.]

(6) Appellants' motion to strike all of said testimony was as follows:

"Mr. Jarvis: Upon the grounds which we have specified in our objections we move to strike all the testimony of Mr. Metz on direct examination.

The Court: Motion denied." [T. of R. p. 112.]

(7) Appellants' motion to strike was as follows:

"Mr. Jarvis: We have three motions to strike directed to particular portions of Mr. Metz's testimony.

The first is, the defendants move to strike the part that 90 per cent of the value of the material going into the manufacture of this cable is made up of lead and copper.

The second motion—

The Court: Let us have one at a time.

Mr. Jarvis: —on the ground that the evidence is incompetent, irrelevant and immaterial.

The Court: The motion will be denied.

Mr. Jarvis: And the second motion to strike the testimony of Mr. Metz is that the material which they actually used in the manufacture of this cable under this contract actually cost more than $24,000 than it cost at the time they entered into the contract. In other words, during the month of April, 1946, it doesn't matter to the court in interpreting the contract whether the plaintiffs made a profit or loss.

The Court: It indicates there was a substantial increase in price. It is similar to the situation that arises in a patent lawsuit; in other words, to show that the invention has been reduced to practice you may show the sale, not as an indication of damages, but to show it was not a proper payment. The object of having this in is to show that there was a substantial fluctuation in price, although the testimony that there was an increase, whether it was great or small, is not material. I think I will allow it to stand, to show that it was substantial.

Mr. Jarvis: The third motion to strike would be the testimony of Mr. Metz as to Code No. 472.1 being used by the Department of Labor, and the specifications did comply with the specifications set out in this contract, being the same code number, and we fail to see how the use of such code number has any bearing on this case. I don't know that the matter is of much moment.

(Argument.)

The Court: Motion denied." [T. of R. pp. 133-134.]

5. The Court erred in making its Findings of Fact and Conclusions of Law and its Judgment that appellee recover interest at seven per cent per annum on $9,996.69 from May 1, 1947, to March 14, 1949, the date of judgment in this case, amounting to $1,306.21, for the reason that interest prior to judgment cannot be recovered against a municipality in the absence of special statutory authorization or contract therefor.

IV.

Summary of Argument.

The findings of the District Court that the monthly indexes for lead and copper were intended by the parties is not binding and may be set aside where clearly erroneous.

It is a question of law for this Court to determine whether any uncertainty or ambiguity exists in the contract. None exists here because the language is not reasonably susceptible of more than one meaning.

The testimony of appellee's witness, Mr. Metz, as to the cost of lead and copper did not pertain to the circumstances surrounding the making of the contract and enable the Court to place itself in the same situation in which the parties found themselves at the time of contracting, but generally concerned matters subsequent to execution of the contract, and the hardship suffered by appellee. Neither this nor his testimony as to other matters raised any conflict in the evidence as to the circumstances surrounding the making of the contract.

There is no conflict in the evidence that the term "group" has a clear and well-defined meaning when used with the phrase "Index of Wholesale Prices * * * compiled monthly by the U. S. Department of Labor," and that "Metals and Metal Products" is the sixth group in the index and is not a subgroup under "All Commodities."

There is no conflict in the evidence that the parties intended that the group index rather than the index figures for lead and copper were to be used for adjustment for increases in material costs. This intent on the part of the Department is shown by Mr. Foster's testimony.

The Price Adjustment Clause contained eleven features of a nature which limited price adjustment in many respects.

If the contract does not provide for adjustment based upon the group index there is no provision for price adjustment. The contract does not contain any formula for price adjustment based upon the use of the index figures for lead and copper; nor is there any logical basis for price adjustment being made with equal weight given to each.

Even if the contract were uncertain or ambiguous in its wording, appellee's conduct in presenting and receiving payment on six invoices for price adjustment for over two-thirds of the unadjusted contract price is a practical construction placed by appellee upon the contract and is the best evidence of its intention in executing the contract. This construction is not at variance with the correct legal interpretation of the contract. It is the duty of the Court to give effect to the intention of the parties.

This action was for money due under contract, with interest prior to judgment. In California, unless there is express statutory authority or provision in the contract for the payment of interest prior to judgment, no recovery of such interest can be had against a municipality. Interest can only be recovered from the date of judgment. If appellee was entitled to judgment herein, it would be entitled to interest only from the date of judgment.

V.
ARGUMENT.

1. The District Court's Finding That the Monthly Indexes for Lead and Copper Were Intended by the Parties Is Not Binding and May Be Set Aside Where Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure prescribes that findings in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *United States v. United States Gypsum Co.* (Mar. 1948), 333 U. S. 364, at 394 and 395, the court held that under the rule a finding of fact by the trial court is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. This was an appeal by the Government from an order of dismissal at the end of the presentation of its case before a three-judge court. The Supreme Court reversed the order and remanded the case for further proceedings. In effect, the court said that judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by a jury. So the court may reverse the findings by a trial court where clearly erroneous. In this case the Government relied very largely upon documentary exhibits and called as witnesses the authors of the documents. The court said that where testimony is in conflict with contemporaneous documents,

the court could give it little weight, particularly where the crucial issues involve mixed questions of law and fact. So despite the opportunity of the trial court to appraise the credibility of the witnesses, it could not under the circumstances rule otherwise than that the finding was clearly erroneous.

This court in *Gates v. General Casualty Co. of America* (1941, 9 Cir.), 120 F. 2d 925, at 929, stated that under Rule 52(a) of the Federal Rules of Civil Procedure the court has a broader power of review than the courts of appeal in the State of California. The District Court's finding in that case was held clearly erroneous. Just preceding this statement the court says that where the issue on such a contention is involved and the trial court may make inferences from it favoring either party, the appellate court in California will not assume to retry the case.

This court in *Mateas v. Fred Harvey* (1945, 9 Cir.), 146 F. 2d 989, reversed the finding of the District Court, that the evidence presented could not support the inference either of neglect or of violation of warranty, on the ground that it was "clearly erroneous." The District Court tried this case without the aid of a jury, and at the close of plaintiff's case granted the motion of defendant and appellant to dismiss.

It is well settled that an appellate court in California is not bound by the trial court's construction of a contract or other written instrument based solely upon the terms of the instrument.

Trubowitch v. Riverbank Canning Co. (1947), 30 Cal. 2d 335, at 339, 182 P. 2d 182.

There are many other California cases stating this rule in varying situations, such as where no evidence is offered or received for the purpose of showing the intention of the parties (*Moore v. Wood* (1945), 26 Cal. 2d 621, at 629, 160 P. 2d 772); where there is no conflict in the evidence, or where a determination has been made upon incompetent evidence (*Estate of Platt* (1942), 21 Cal. 2d 343, 352); where parol evidence of an oral promise by defendants' predecessor antedating the contract was incompetent as varying the terms of the contract where there was no uncertainty in the language (*Rilovich v. Raymond* (1937), 20 Cal. App. 2d 630, 639-640); where there was no conflict in the evidence introduced in aid of construction (*Moffatt v. Tight* (1941), 44 Cal. App. 2d 643); where there was no evidence of any negotiations leading up to the agreement and there was nothing in the circumstances of the parties at the time they made the agreement to show what they had in mind (*Thompson v. Levereau* (1944), 66 Cal. App. 2d 795, at 806); where the contract was clear and unambiguous and susceptible of only one interpretation (*Herzog v. Blatt* (1947), 80 Cal. App. 2d 340, 344); where no extrinsic evidence was taken (*Ohran v. National Automobile Insurance Co.* (1947), 82 Cal. App. 2d 636, at 648; *Transport Oil Co. v. Exeter Oil Co.* (1948), 84 Cal. App. 2d 616, at 620, 191 P. 2d 129); where there was no substantial conflict in the evidence (*MacDonald v. Rosenfeld* (1948), 83 Cal. App. 2d 221, at 237, 188 P. 2d 519).

Appellants respectfully submit that appellate courts of the State of California have, under the authorities cited, very broad powers of review in cases where there is no extrinsic evidence to aid in the interpretation of a contract, or there is no conflict in the evidence, or the trial court considered testimony improperly admitted, and in such instances the construction of the contract by the trial court presents a question of law which the appellate courts must determine.

Appellants submit that the present case comes within the California rule, as shown by the foregoing authorities, as well as within the Federal Rule; that the Findings of Fact and Conclusions of Law and the Judgment of the District Court are clearly erroneous for the reason that the contract was not uncertain or ambiguous. Mr. Metz's testimony regarding subsequent matters was incompetent evidence and could not properly be considered in interpreting the contract; that his testimony did not pertain to the circumstances surrounding the making of the agreement and the remaining evidence shows without conflict that the words used in the clause refer to the group index for "Metals and Metal Products." To state it another way, all the remaining evidence is wholly consistent with and supports the meaning obtained from a plain reading of the language.

2. **It Is a Question of Law for This Court to Determine Whether Any Uncertainty or Ambiguity Exists in the Contract and None Exists Here Because the Language Is Not Reasonably Susceptible of More Than One Meaning.**

This case came before the District Court on the ground of diversity of citizenship and is governed by the law of the State of California.

28 U. S. C. 1652;

Erie R. R. Co. v. Tompkins (April 25, 1938), 304 U. S. 64, 82 L. Ed. 1188.

In *Brant v. California Dairies, Inc.* (1935), 4 Cal. 2d 128, the court at page 133 says in construing a contract the question of whether any uncertainty or ambiguity exists is one of law and the lower court's finding on this issue is not binding on appeal.

The same rule is stated in *Whiting Stoker Co. v. Chicago Stoker Corp.* (7 Cir., 1948), 171 F. 2d 248. (Citing 17 Corpus Juris Secundum, Contracts, Sec. 617, and cases.) The court says a contract is ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions. It is not ambiguous if the court can determine its meaning without any guide other than a knowledge of simple facts on which, from the nature of the language in general, its meaning depends. A contract is not rendered ambiguous by the mere fact that the parties do not agree upon its proper construction. An ambiguous contract is one capable of being understood in more senses than one; an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning. The court says a possibility of doubt is not sufficient, for it is out of such possibilities that controversies arise. It is the

duty of the court to ascertain by judicial interpretation, not whether a doubt may be asserted, but whether any ambiguity really exists. There are many similar judicial expressions and they may be summarized by saying that a contract is ambiguous when the language used is reasonably susceptible of more than one meaning.

In *Ogburn v. Travelers Ins. Co.* (1929), 207 Cal. 50, at 52, the court states that in the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties, and this rule is recognized in Section 1636 of the Civil Code. The intention is to be ascertained from a consideration of the language employed and the subject-matter of the agreement. It should be construed as an entirety.

In *Universal Sales Corp. v. California Press Manufacturing Co.* (1942), 20 Cal. 2d 751, 760-762, the court said the first rule respecting interpretation is that the court may not apply one of the well recognized rules as an aid in its construction of a contract until it is first satisfied that the language is fairly susceptible of two different interpretations.

In *Beaumon v. Kittle Manufacturing Co.* (1932), 122 Cal. App. 547, 549, it is said that a court cannot and should not attempt to wrench the language from its ordinary meaning and where a document is not ambiguous, no construction is allowable.

In *Rabbit v. Union Indemnity Co.* (1934), 140 Cal. App. 575, at 585, the court said the intention of the parties as it existed at the time of contracting is to be determined by the court. This is based on California Civil Code, Section 1636.

The contract in this case was awarded on competitive sealed bids. There were no negotiations preliminary to the execution of the contract in the usual sense although prior to March 29, 1946, the date of advertising for bids, a draft of the Price Adjustment Clause which was later used in this contract was given to appellee's representative. He later told Mr. Foster, Purchasing Agent for the Department, that appellee would bid in response to the advertisement. [T. of R. pp. 138-140.] The contract consists of one page, to which is attached the contractor's bond, appellee's proposal dated April 9, 1946, instructions to bidders, general conditions, detailed specifications and standard specifications. The Price Adjustment Clause appears on pages 10, 11 and 12 of the detailed specifications attached to appellee's proposal. [Deft. Ex. A; T. of R. p. 114.] Appellee had from some time in March, until April 9, 1946, the date of its proposal, in which to consider the clause.

The full price adjustment clause appears three times in the Transcript of Record, pages 11 to 14, inclusive; pages 32 to 35, inclusive, and pages 83 to 87, inclusive, and in Defendants' Exhibit A at pages 10, 11 and 12, so it is not repeated here at length. Appellants' success or failure in this appeal rests upon the meaning of one sentence of the clause, reading as follows:

> "b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the U. S. Department of Labor. * * *" [T. of R. p. 85.]

In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.

Section 1858 of the Code of Civil Procedure of the State of California.

The District Court did not ascertain and declare what was in terms and in substance contained therein; but on the contrary inserted what was omitted and the findings omit what has been inserted. The court wrote a new contract.

Appellants will demonstrate this is so, by showing as stricken and by underscoring the language omitted and required to be inserted in order to write a clause with the meaning given by the findings.

"2. *Material:*

"(a) For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

"(b) The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the mathematical average of the index of wholesale prices for ~~'Group VI,~~ copper, electrolytic, delivered Connecticut Valley, and for lead, pig, desilverized, f. o. b. New York, as set forth in the subgroup entitled 'Nonferrous metals' in the group entitled Metals and Metal Products', compiled monthly by the U. S. Department of Labor. The mathematical average of the monthly material index figures for the two commodities for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will

be secured by a comparison of such average monthly material index figure with the mathematical average of the two material index figures for the Base Month. * * *"

"(c) If the average monthly material index figure computed as provided in paragraph b, is less than the mathematical average of the two material index figures for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941, figure will be computed."

The foregoing demonstrates, we submit, that the contract was not "construed according to its plain meaning." The correct rule is stated in *Lowber v. Bangs,* 69 U. S. 728, 17 L. Ed. 768, 769, as follows:

"'The construction to be put upon contracts of this sort depends upon the intention of the parties, to be gathered from the language of the individual instrument. * * * All mercantile contracts ought to be construed according to their plain meaning, to men of sense and understanding, and not according to forced and refined constructions, which are intelligible only to lawyers, and scarcely to them.' * * *

"Contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in this controversy. * * *"

With these rules in mind, appellants submit that the remaining portions of this brief will show that the contract was not uncertain or ambiguous, and that all of the competent evidence which could be considered in interpreting the contract shows that the District Court's findings as to which index was intended were clearly erroneous.

3. Mr. Metz's Testimony as to the Cost of Lead and Copper Did Not Pertain to Circumstances Surrounding the Making of the Agreement but to the Hardship Suffered by Appellee Subsequently and None of His Testimony Raised Any Conflict in the Evidence.

The trial court may look into the circumstances surrounding the making of an agreement (Civ. Code, Sec. 1647), including the object, nature and subject-matter of the writing and the preliminary negotiations between the parties, and thus place itself in the same situation in which the parties were at the time of contracting. (*Universal Sales Corp. v. California Press Manufacturing Co.*, 20 Cal. 2d 751 at 761.)

As shown in appellants' Specifications of Error No. 4, the District Court overruled appellants' objections to portions of the testimony of Mr. Metz, a witness for the plaintiff. Appellants' motions to strike this testimony were also denied by the court. These portions of Mr. Metz's testimony were that he had occasion to make a calculation of the lead and copper compared with other materials involved in the contract and that their cost was 90 per cent of the cost of all materials used in the cable; that appellee did not have sufficient quantity of copper and lead on hand in May, 1946, to cover this contract; that copper and lead were controlled by the Government and that only purchases for use in production in the following month could be made, and that appellee had to pay about $24,000 more for the copper than its price was in April and May, 1946.

His testimony as to percentage of cost and the total cost and subsequent purchases pertained to matters which occurred *after* the execution of the contract. While it does

not raise any conflict in the evidence this could not assist the court in the performance of its duty in ascertaining the intent of the parties because it did not relate to the circumstances surrounding the parties at the time they contracted. It did not pertain to the object or the nature or the subject-matter of the agreement. There were really no preliminary negotiations here, although appellee's representative was given a copy of the Price Adjustment Clause prior to advertising, bids were advertised for and sealed bids were received. This testimony was all of a "hindsight" and hardship nature. Calculations of the cost of lead and copper with the cost of other materials could only be made after the contract was completed. Neither party knew, when the contract was executed, that lead and copper would cost 90 per cent of the cost of all the materials,—that is, the cost to appellee. The continuance of government control of purchases and the purchase of lead and copper during the period of manufacture, like their cost, was all subsequent to execution.

The same is true as to the actual cost of copper and lead being $24,000 more than the cost in April, 1946. Neither party knew this at the time of execution. It was not possible for them to know this until afterwards.

No authority sustains the proposition that under the guise of construction or explanation, a meaning can be given to an instrument which was not found in the instrument itself but is based entirely upon direct evidence of intention independent of the instrument. (*Brant v. California Dairies, Inc.*, 4 Cal. 2d 128 at 133.) Mr. Metz's testimony was the converse of Carver's in the *Brant* case as to his intention when he executed the contract. Mr. Metz's testimony is as to facts subsequent to the contract and was fully as irrelevant, immaterial and

therefore inadmissible under the parol evidence rule as was Carver's.

The Court's finding that, in buying lead and copper for this contract, appellee "was reasonably required to pay and did pay for said lead and copper prices in excess of the market price of said lead and copper in the month of April, 1946, and said excess actual cost was substantially more than the amount which plaintiff seeks to recover herein by virtue of said price adjustment clause, and substantially more than the amount herein sought to be recovered added to all payments heretofore made by defendants to plaintiff on account of said price adjustment clause" [T. of R. p. 88] is fully as irrelevant and immaterial as the evidence. It is based upon inadmissible "hindsight" evidence. We respectfully submit that the court's decision was improperly influenced by and based upon "hindsight."

Mr. Metz's testimony on this point was not only inadmissible, but by reason of its nature it could not have been of any aid or assistance to the District Court in interpreting the intent of the parties to this contract. It did not inform the court of any circumstances surrounding the making of the agreement. The only possible effect which it could have had was to influence the court's decision in appellee's favor because it had paid about $20,000 more for lead and copper than it had been compensated for at the time of trial. Where the court has improperly received evidence and made a determination upon such evidence, its finding is not binding upon the appellate court. With or without this testimony there is no conflict whatsoever in the evidence as to any circumstances surrounding the making of the agreement. It was not properly admitted but neither could it or testi-

mony as to the quantity of lead and copper on hand in May, 1946, and government control of their purchase at that time have been of any aid or assistance in interpreting the intent of the parties. The remaining portions of his testimony were in complete agreement with the testimony of Mr. Gray, a witness for appellant, and Defendants' Exhibits B, C, and D.

4. The Evidence Shows Without Conflict That the Term "Group" Has a Clear, Well-Defined Meaning When Used in Connection With "The Index of Wholesale Prices * * * Compiled Monthly by the U. S. Department of Labor," and That "Metals and Metal Products" Is the Sixth Group in Such Index and Is Not a Subgroup Under "All Commodities."

The following discussion deals with Defendants' Exhibit A (the contract) and the U. S. Department of Labor, Bureau of Labor Statistics publications in evidence in Defendants' Exhibit O ("Monthly Labor Review"), Plaintiff's Exhibit 1 (Bulletin No. 920 and Monthly Mimeographed Releases) and Plaintiff's Exhibit 3 ("Monthly Labor Review"). These publications and their use of the terms "All Commodities," "group" and "subgroup" proves conclusively that "Metals and Metal Products" has been treated as a group by the Bureau of Labor Statistics continuously since 1902, when it started to issue an official wholesale price index. This index was extended by the Bureau on a monthly basis back to 1890, and on an annual basis as far back as 1749. Separate monthly indexes have been prepared by the Bureau and are available for major groups of commodities from the year 1890 and for most of the subgroups from 1913.

[Pltf. Ex. 3, "Monthly Labor Review," August, 1948, p. 155.]

The classification of more than 850 commodities by the Department of Labor into groups and subgroups is illustrated in seven (7) different places in the exhibits in evidence in this case.

Plaintiff's Exhibit 1 shows the grouping in five places. Bulletin No. 920 contains Table 1 on pages 11 and 12; Table 2 on page 13, and Table 12 on pages 37 to 137. The title to Tables 1 and 2 refers to index numbers of primary market prices, by *groups* and *subgroups* of commodities, and Table 12 refers to primary market prices index numbers and relative importance of commodities.

The three monthly mimeographed releases for January, February and March, 1947, are also a part of Plaintiff's Exhibit 1. Each contains two tables. One shows the average wholesale prices and index numbers of individual commodities, and the other (Appendix, last page) the index numbers of wholesale prices by *groups* and *subgroups* of commodities.

Defendants' Exhibit O is a copy of the "Monthly Labor Review" for June, 1946, Volume 62, No. 6, and contains Table 1 and Table 2 on pages 974 and 975. The titles have similar wording: "Indexes of Wholesale Prices by Groups and Subgroups of Commodities * * *"; and "Index Numbers of Wholesale Prices by Groups of Commodities."

In all tables the same *groups* and *subgroups* are found. The *sixth group* is always "Metals and Metal Products," and this group has an index number or figure in each instance.

Individual commodity index numbers are only shown in Table 12 in Bulletin No. 920 and one of the tables in the monthly mimeographed releases.

The compiler of the tables was consistent in the grouping and followed a fixed arrangement. To anyone having knowledge of and familiarity with the tables, the contract clause clearly intends the group index for the sixth group. Both the use of the Roman numeral and the title "Metals and Metal Products" indicated the group index number, not the index figure for lead or for copper, because if that had been intended it would have been so easy to have said so. Enough had been said by "Group VI—Metals and Metal Products."

The standardization of this classification into groups and subgroups by the Bureau of Labor Statistics is shown throughout the contents of Bulletin No. 920 [Pltf. Ex. 1]. On page 1, under the heading "Description and Use of BLS Primary Market Price Data" and a subheading "The Wholesale Price Index," appears the following:

> "The primary market price data collected by the Bureau are used in making a number of price indexes, of which the most important is the wholesale price index. This index is based on prices of about 850 major commodities combined into 49 subgroups, 10 major groups, and 5 economic groups. All types of commodities, from raw materials to finished industrial and consumer goods, are represented. Indexes are published monthly for all groups and subgroups but weekly only for the 10 major groups and 5 economic groups. Because of differences in methods of calculation during earlier periods, the monthly and weekly indexes are not directly comparable as to level. * * *

* * * * * * * *

"The relation of the value aggregate for each commodity expressed as a percentage of the value aggregate of all commodities in the index in 1946 is shown in table 12 under the heading 'Relative importance, year 1946.' The relative importance of each commodity in the index changes as the rate of price change varies among commodities, since it is based on the product of the quantity weighting factor and the current price. Thus, it may be different in the index for each period."

The Bureau of Labor Statistics, hereinafter called the "Bureau," through its Bulletin No. 920, at page 2, states:

"Certain commodities are included in more than 1 commodity group and these duplications must be kept in mind in using this procedure for calculating special indexes. Thus prices of 23 commodities are included in both the farm products and foods indexes, and prices of *23 other commodities are included in both the metals and metal products and building materials groups*. The commodities so duplicated are listed in table 12 under the foods and building materials groups, with appropriate reference as to where price data are shown. These 46 commodities are counted only once in the all-commodities index. The relative importance figures shown in table 12 for the farm products and *metals and metal products groups* and *subgroups* include these duplicated commodities. The relative importance of the foods and building materials *groups* and *subgroups* do not include these duplicated commodities." (Italics supplied.)

Near the bottom of page 3 of the Bulletin is a heading "Summary of Primary Market Price Movements, 1946," following which are several headings, the sixth of which

is "Metals and Metal Products." At the top of page 9, in the half page of text following this heading, "Metals and Metal Products" are treated as a group.

On page 10, the Bureau, through its Bulletin No. 920, states:

> "PRIMARY MARKET PRICES—INDEX NUMBERS, BY GROUPS AND SUBGROUPS OF COMMODITIES
>
> "Index numbers of primary market prices by groups and subgroups of commodities are shown for each month and the year 1946 in table 1, and for selected years in table 2. The commodities included in the groups 'Raw Materials,' 'Semimanufactured articles,' and 'Manufactured products' are listed on pages 8 and 9 of Wholesale Prices, 1944 (Bull. No. 870). *These indexes are published regularly in monthly mimeographed reports and in the Monthly Labor Review.*" (Italics supplied.)

On pages 11 and 12 of the Bulletin appears Table 1. At the top of the left-hand column of the table is the heading "Groups and subgroups." Opposite this heading appear index numbers for "All commodities" for each month during the year and the average for the year. These index numbers are separated by a *double black line* from the index numbers following below it. Next in the left-hand column are listed the ten groups with their subgroups, the sixth group being "Metals and Metal Products." The same is true in Table 2 on page 13 of the Bulletin.

In Bulletin No. 920 at page 25, in speaking of the revision of prices and index numbers for motor vehicles, the Bureau states that "Prices and indexes were carried back to 1913 *and were included as a subgroup of the metals and metal products group.*" (Italics supplied.)

Again, in Bulletin No. 920 at page 27, the Bureau refers to motor vehicles as a subgroup and says the revision mentioned

> "affected several groups of the Bureau's primary market price index. *Certain of the group indexes were in use for contract adjustments, and special indexes for the affected groups were calculated which continued to use the April 1942 prices.*" (Italics supplied.)

As shown, the classification is the same in all seven tables. In Bulletin No. 920, Table 12 is introduced on page 37, begins on page 38, and is more detailed than the other tables. On page 38 certain commodities are listed and their units stated with their average primary market prices for 1946 by months, and the yearly average in the last column. On the facing page (39) is a listing of the same commodities with their relative importance for the year, average index by months of primary market prices, and the average for the year. "Metals and Metal Products" is the sixth group in the table. This grouping is indicated by the larger black-face type for the ten major groups, with smaller black type for the subgroups, and regular type for each individual commodity. The index numbers for "All Commodities" are separated from the other index numbers by double black lines and the same type is used for it as is used for the subgroups. The "All Commodities" index is separate and apart from the groups. It represents the resulting index figures for all of the individual commodities *without duplication.*

There are 46 commodities which are used in more than one group. Twenty-three are included "in both the farm products and food indexes." The prices of "23 other commodities are included in both the metals and metal

products and building materials groups." But, "these 46 commodities are counted only once in the 'all commodities' index." Their relative importance is shown only in one of the group [Pltf. Ex. 1—Bulletin No. 920, p. 2, quoted *supra*].

The point is that none of the 10 major groups is listed in the table as "one of the subgroups under 'All Commodities.'" The District Court's finding "That Metals and Metal Products as a group is, however, listed therein as one of the subgroups under 'All Commodities'" [T. of R. p. 89] is not supported by any of the evidence whatsoever. The finding is erroneous and against all the evidence.

Further, the finding of the District Court "that said 'Index Numbers of Individual Commodities' does not contain any 'Group VI' as quoted in the price adjustment clause herein referred to" [T. of R. p. 89] is not supported by any of the evidence whatsoever. That finding is also erroneous and against all the evidence. The evidence all shows that there is a "Group" and that it is the "VI" group or sixth group in all of the tables and is referred to by the Bureau of Labor Statistics in each instance as a Group and that it is "Group VI—Metals and Metal Products," as stated in the contract. [T. of R. p. 85.]

This is further shown by the column headed "Relative importance, year, 1946." Opposite "All Commodities" is the figure 100. In this same column opposite the title of each of the "10 major groups" appear the figures 22.03, 20.49, 3.18, 8.65, 13.07, 13.32, 5.91, 1.68, 2.39 and 9.28, making a total of 100.

All ten groups together have the same total "Relative importance" as "All Commodities." Both are based upon

all 850 individual commodities. There are duplications of commodities in the groups but no duplications in "All Commodities." This is just one more reason why none of the ten major groups are subgroups of "All Commodities," and that the only subgroups in the table are those under the groups, such as "Nonferrous metals."

The classification by the Bureau is further shown in Plaintiff's Exhibit 3, "Monthly Labor Review" for August, 1948, Volume 67, page 2, at page 155, in a portion of an article by S. Robert Mitchell, of the Bureau's Division of Prices and Cost of Living, entitled "Wholesale Price Index: Policy on Revisions and Corrections." The article continuously refers to "groups and subgroups"; the "metals and metal products group"; "four subgroups —motor vehicles, tires and tubes, furniture, and agricultural machinery and equipment"; "the published all-commodity index and the pertinent group index"; "the changing of the indexes for metals and metal products group by revision of the subgroup * * * motor vehicles"; "the all-commodity index"; "the effect of introducing the revised agricultural machinery and equipment subgroup sample into the calculation of the metals and metal products group and all-commodity indexes"; and on page 155 states:

"General Description of the Index.

"The Bureau of Labor Statistics has issued continuously since 1902 an official wholesale price index as an indicator of general price trends and average changes in commodity prices at primary market levels. The index was extended by the Bureau on a monthly basis, back to 1890, and annually as far back as 1749, by using data compiled in a number of special Government surveys and privately financed research pro-

ject. Separate monthly indexes are available for major groups of commodities from the year 1890, and for most of the subgroups from 1913.

"The Bureau's wholesale price index thus provides one of the most comprehensive examples of a continuous economic series in the United States. It includes at the present time more than 850 individual commodities, which are classified into 10 major groups and 49 subgroups. These commodities are also combined into 5 special groupings for which separate indexes are issued—raw materials, semimanufactured articles, manufactured products, all commodities other than farm products, and all commodities other than farm products and foods. Current indexes are published regularly in the Current Labor Statistics department of the Monthly Labor Review."

The foregoing shows conclusively that, according to the Bureau of Labor Statistics and to all those familiar with its treatment and classification of commodities in the tables, the sixth group is "Metals and Metal Products."

There is no evidence to support the finding "that said 'Index Numbers of Individual Commodities' does not contain any 'Group VI,' as quoted in the price adjustment clause herein referred to." All of the evidence without conflict shows that there is a sixth group. To any informed reader "Group VI" means the sixth group, whether the Roman numeral itself actually appears in the table or not. When "Group VI" appears in the clause with "Metals and Metal Products" there can be no question as to the intent conveyed by a reading of the contract. It is not uncertain or ambiguous. It refers to the index figure for the group. As demonstrated the finding strikes from the contract the word and numeral "Group VI," when the law requires that the words in the contract be given their usual meaning and that they not be ignored.

Definitions of the words "group" and "subgroup" are:

In Funk & Wagnall's New Standard Dictionary, 1941, "group" is defined as follows:

> "Group, n. 1. A number of persons or things existing or brought together with or without interrelation, orderly form or arrangement; and assemblage; a cluster, as a *group* of cottages; a *group* of facts."

The term "sub" is a Latin word meaning "under, below." (Black's Law Dictionary [DeLuxe Third Edition, 1944]; Cyclopaedic Law Dictionary (2nd Ed., 1922).)

In *Durand v. Bethlehem Steel Co.* (Third Circuit), 122 F. 2d 321, at page 322, the court says:

> "The prefix 'sub' signifies nothing more than that the term to which it is prefixed is present in only relatively small proportion or in less than the normal amount."

All the evidence shows without conflict that the terms "all commodities," "group" and "subgroup" have a fixed, well defined meaning.

"All Commodities" is something separate and apart from any one of or all of the ten major groups. It cannot properly be said that any one of the ten is a subgroup under "All Commodities." "Groups" means any one of the ten major groups of commodities. These are not used to make up the "All Commodities" index figure, although the same individual commodities which are used in making up the ten major groups, with 46 duplications, are used without any duplication in making up the "All Commodities" index figure. The meaning of the term "subgroup" is illustrated by the statement that "nonferrous metals" is a subgroup of the "Metals and Metals Products" group.

5. **The Evidence Shows Without Conflict That the Parties Intended That Adjustment for Increases in Material Costs Was to Be Made Upon the Group Index Rather Than Upon the Index Figures for Lead and Copper.**

The Department clearly intended the use of the group index. There is no conflict in the evidence on this point. The Department's intent is shown by the testimony of Mr. Foster, Purchasing Agent of the Department and a witness for appellants. [T. of R. pp. 136 to 142.]

He stated that in an attempt to standardize in the use of price adjustment clauses, the Department had chosen this one and used it in the purchase of many varied types of products from 1941 to 1948. [T. of R. pp. 135-138.] Besides this and another contract with appellee, contracts were made with the General Electric Company and the General Cable Corporation and others. [T. of R. p. 137.] Contracts with this clause were made for the purchase of:

Seamless carbon molybdenum pipe;

Oil circuit breakers;

Metal enclosed switch gear;

Cast steel valves;

Lead covered cable;

Steam turbine electric generators; and other types of machinery.

Mr. Foster testified that this clause was used generally in all contracts for machinery and equipment of the nature listed above. [T. of R. p. 140.] The reason it was used by the Department was because it was impossible to buy material from anyone on a firm price basis. The clause was worked up primarily in the hopes that the Department

would not have too many adjustment clauses and it could use just one. It was picked because that *group* was used in a lot of materials and equipment that the Department purchased. It was thought that it would save the necessity of having different types of adjustment.

Mr. Foster said it was put in for two reasons: First, to be able to do business; and second, the adjustment clause was a protection to the parties. The Department was buying all sorts of electrical supplies and the main thing was, if prices went down the Department wanted the reduced price. The Department was not interested so much in the general uptrend of prices as in the trend in things it wanted. The adjustment clause was to favor electrical products.

Mr. Foster said the metal products Group VI was chosen for the purpose of reducing to the lowest possible number the price adjustment clauses the Department would have to use. There are a great many materials in that group and the Department thought, to take a group of that kind, it would reduce by a considerable number the price adjustment clauses which the Department would have to have. The length of delivery periods covered by these contracts covered from six months to two years or more.

Mr. Foster concluded, saying the Department had in mind that the component figure for many groups was a more conservative figure on which to adjust the price rather than the individual commodity. [T. of R. pp. 137 to 142.]

Clearly, the Department intended to use the group index and not the index for any individual commodity. It reduced the number of clauses to be used in its contracts; saved confusion, and made it easier for all to have just

one formula for electrical products manufactured primarily out of the metals in the chosen group.

There is no express language in the contract specifying the use of index numbers for lead and copper. In a previous portion of the argument appellants have demonstrated by underscoring the words which would have to be written into the contract to make the clause read in conformity with the District Court's findings. The clause is written so that only one index figure for each of the months involved is required to be found in order to calculate the price adjustment.

A further consideration of the Price Adjustment Clause seems desirable. It contains many provisions indicating that the parties did not intend to achieve complete price adjustment. The use of the group index is only one of these several features. The others are:

(1) The price was not to be increased in excess of the applicable *maximum OPA price* on delivery.

(2) Only *20 per cent* of the contract price was taken as representing labor costs.

(3) The contractor received the *average* increase in the index figure for labor costs without regard to the time of payment of wages.

(4) The Department was not to receive the benefit of labor decreases until the average monthly labor index figure fell below the *October, 1941,* index figure for a contract executed in 1946.

(5) The portion of the contract price representing material was fixed at 50 per cent.

This was not accurate. This 50 per cent, plus the 20 per cent labor, or 70 per cent, left 30 per cent of

the contract price without any provision for its adjustment.

(6) The contractor received the *average* increase in the index figure for material costs without regard to the time of purchase.

(7) The Department was not to receive the benefit of any material decreases unless the *average* material index figure was less than the index figure for October, 1941, in a contract executed in 1946.

(8) If shipment was delayed for specified reasons more than three months, the contractor had the *option* to base adjustment for both labor and material on the period from the date of the receipt of its bid to the date when *complete,* not partial, shipment was made.

(9) The percentage of increase or decrease was to be calculated to the *nearest* one-tenth of one per cent.

(10) The total price increase could not exceed 30 per cent of the original bid price.

Even though the cost of labor and materials and manufacturing had doubled, the price could be increased by only 30 per cent.

In the face of these *eleven* arbitrary features of the clause, appellee's contention and the Court's attempt in the findings for a full and complete adjustment of prices according to actual market prices falls down and is shown to be wholly without merit. The formula demonstrates in itself that it was not intended to accurately and fully adjust the price to all fluctuations of the market for either party.

The Court erred in making its finding that the language used in the Price Adjustment Clause was intended to and does refer to the index numbers of copper and lead and not to the "Metals and Metal Products" group for use in computing the increase in the contract price, and the Court erred in making its finding of the percentage of increase of the index numbers relating to copper and lead as stated in the findings. [T. of R. pp. 89 and 92.] This finding is against the expressly declared intent of the parties and is not supported by the evidence.

6. If the Contract Does Not Provide for Price Adjustment Based Upon the Group Index, There Is No Contract for Price Adjustment.

The District Court found that "the percentage of increase of index numbers relating to copper and lead * * * computed in accordance with the terms and provisions of said price adjustment clause were for the period from April, 1946 (the Base Month) to and including October, 1946 17.6%; and for the period from April, 1946 (the Base Month) to and including January 31, 1947 33.2%; for the period from April, 1946 (the Base Month) to and including the month of March, 1947 43.2%. That relating said percentage increases to the contract price as provided for in said price adjustment clause, the Court finds that plaintiff is entitled to a price increase in the amount of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars ($9,996.69), in addition to all amounts heretofore paid by defendants to plaintiff."

The findings do not show how these percentages of increase were computed, although an understanding of the method of computation is absolutely indispensable to an appreciation of the true import of this finding.

The appellants have made the computations necessary to arrive at the percentage result found by the District Court, and a summary of these computations is set forth in Paragraph IV of appellants' answer. [T. of R. p. 18.] An outline of this method of computation may be stated as follows:

The three delivery periods involved are correctly stated in the finding quoted above as April, 1946, through October, 1946; April, 1946, through January, 1947; and April, 1946, through March, 1947. The monthly index figures for lead and copper were combined and averaged for each delivery period. From this average figure there was deducted the combined index figures (lead and copper) for April, 1946. This gave the number of points of increase for each delivery period, and from this the percentages stated by the Court were derived.

For example, the copper and lead index figures for April, 1946, combined, equalled 162.5. The lead and copper index figures for the months of April through October, 1946, combined for each month and averaged, were 191.1. Deducting 162.5 from 191.1 leaves 28.6, which is the number of points of increase for that delivery period. This number of points (28.6) is in turn 17.6% of 162.5. So 17.6% is the "percentage of increase," as found by the Court for this period. The percentages of increase for the other two delivery periods as found by the Court must have been, appellants submit, computed in the same manner.

In order to arrive at these percentages the Court *must,* in the computations, have given equal weight to the index figures for lead and for copper, respectively. In the light of the undisputed facts in this case, this is a fatal mistake

and is sufficient to demonstrate that the finding is arbitrary and capricious.

It must be remembered that the District Court refused to allow the price adjustment to rest upon the index figure for the "Metals and Metal Products" group constituting the average of some 140 metals and metal products, saying that such a construction of the contract would be "unrealistic." [T. of R. p. 77.]

What, then, did the Court do in an apparent attempt to be "realistic"?

First, the Court disregarded entirely some 10%, by value, of the materials involved in the contract [T. of R. p. 110.] These materials were largely paper and oil. By its finding, the Court, in effect, required that a price adjustment be made for these nonmetallic materials on the basis of an increase in the price of copper and lead. There is not a word of testimony in the record indicating that paper or oil, individually or in the aggregate, increased in any index numbers or in actual price in the open market by the percentages found by the Court.

Next, and even more important, is the Court's "unrealistic" weighting of the importance of copper and lead, respectively, in determining the proper percentage of increase.

The evidence shows, without dispute, that 385,144 pounds of lead was required for the contract, as against 108,130 pounds of copper. More important, in April, 1946 (the Base Month), the cost of the lead required for the contract was almost twice the cost of the copper re-

quired ($25,034 for lead as against $12,975 for copper). [Defts. Ex. B, Table IV.]

In the face of these facts, the Court made a finding of an applicable percentage of increase which could only be arrived at by assigning to each of these two commodities an equal weight.

We respectfully submit that such a finding is not, and cannot be, based upon the language of the contract or any evidence in this case, and is, in fact, completely arbitrary.

As a purported interpretation of the contract involved, the Court's findings become even more "unrealistic" when applied individually to the 6 different types of cable involved in the contract.

It must be borne in mind that the price adjustment clause to be interpreted in this case was a part of a set of specifications upon which bids were invited. Each of these 6 separate types of cable constituted a separate "item" upon which a bid might be submitted. A separate contract for each of the 6 types of cable might well have been awarded to different contractors. In each of these contracts this same price adjustment clause would necessarily appear.

In these six different types of cable, the ratio of copper to lead by weight varies widely as between types. At one extreme the ratio is copper 1 : lead 0.73. At the other extreme the ratio is copper 1 : lead 9.05. [Defts. Ex. C.] Yet under the Court's interpretation, the price adjustment under each of these contracts would be computed by assigning to each of the two metals a weight of 1 to 1.

In conclusion upon this point we refer to the findings of the District Court criticizing the use of the group index on the ground that it would "render the price adjustment clause unfair, unreasonable, inaccurate and speculative." [T. of R. pp. 92, 93.]

We respectfully submit that the formula hit upon by the District Court as a basis for price adjustment is itself demonstrably subject to criticism on each of these grounds. It disregards completely the price changes affecting 10 per cent of the materials involved and it distorts the monetary importance of the two principal commodities, lead and copper.

In electing to use the index numbers for the "Metals and Metal Products" group as the basis for price adjustment, it was not the expectation of the parties to the contract that this would result in a completely accurate price adjustment, with each of the component elements in the several types of cable properly weighted.

The Court has improperly refused to enforce the contract as written and has evolved a formula of its own; but this formula, in turn, fails to show accurately the changes in the price indexes of the commodities involved in this contract, giving to each commodity its proper weight. The Court's formula may equally be criticized as "unfair, unreasonable, inaccurate and speculative."

The Court's finding of percentages of increase is inconsistent with the agreed contract of the parties.

7. **Assuming the Contract Is Ambiguous, the Conduct of Appellee in Presenting Six Invoices to Appellant for Price Adjustment for More Than Two-thirds of the Contract Price and Accepting Payment Therefor on the Basis of Index for "Metals and Metal Products" Group Is Entitled to Great Weight and Should Have Been Adopted and Enforced by the Court.**

It is the duty of the court to give effect to the intention of the parties where it is not at variance with the correct legal interpretation of the contract and the practical construction placed by the parties on the instrument is the best evidence of their intention.

Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, at 761.

A contract is to be interpreted so as to give effect to the mutual lawful intention of the parties as it existed at the time of contracting.

California Civil Code, Sec. 1636.

Contemporaneous exposition is in general the best.

California Civil Code, Sec. 3535.

The construction of a contract may be shown by conduct of the parties in respect to uncertain terms where the meaning so determined is not unreasonable in view of the language used.

Doll v. Maravilas (1947), 82 Cal. App. 2d 943, at 949, 959, 187 P. 2d 885.

Defendants' Exhibit M consisted of six invoices sent by appellee to the Department dated December 23, 1946, December 31, 1946, February 11, 1947, and April 16, 1947, for price adjustment on cable shipped, for which the unadjusted contract price was $61,053.35, plus taxes. In each invoice appellee computed the amount of increase thereon on account of increases in labor costs and the amount of increase on account of increases in material costs. Each computation for increases in material costs was made upon the group index for "Metals and Metal Products"—*not upon the index for lead and copper.* The Department paid the invoices as received and appellee accepted the payment. Mr. Metz testified that these invoices were sent out by appellee in the usual course of business and were paid by the Department in the same manner. [T. of R. pp. 129-130.] Mr. Metz said he did not see or hear of these invoices until after the contract had been fully performed, and then a formal invoice covering the whole contract was prepared, dated September 29, 1947, and submitted to the Department for the amount claimed in this action. This invoice was received in evidence as Plaintiff's Exhibit 2. [T. of R. pp. 130 to 133.]

The six invoices prepared in December, 1946, and February and April, 1947, prior to the completion of the contract were in accordance with appellants' construction of the contract that the group index was to be used, and as stated in the *Universal Sales Corporation* case, *supra,* is the best evidence of the parties' intention. Also, this interpretation is not at variance with the correct legal interpretation of the contract. It is the practical construc-

tion placed upon the contract by appellee and agreed to by appellants and contrary to the position which appellee now takes in this action.

This evidence does not support the Court's findings under attack here. As already argued none of the evidence which was competent and properly considered by the Court supports these findings. The findings in this regard are wholly unsupported by the evidence and they are clearly erroneous and the judgment based thereon should be reversed.

8. In This Action Against a Municipality, Interest Cannot Be Recovered Prior to Judgment Unless There Is Express Statutory Authority or Contract Therefor.

The contract [Defendants' Exhibit A] does not contain any provision for the payment of interest on any of the payments to be made under the contract. Neither is there any express statutory authority in the Charter of The City of Los Angeles or in the laws of the State of California for the recovery of interest prior to judgment in this action.

The leading case in California stating this rule of law is *Engebretson v. City of San Diego* (April, 1921), 185 Cal. 475, 197 Pac. 651. This was a suit for money due under contract, with interest from the date on which payments were due. The rule is fully stated and expressed on pages 479 and 480 of the opinion in the California Reports. Six earlier California cases are cited as supporting

the rule quoted by the court from Ruling Case Law (15 R. C. L., Sec. 14, p. 17). The theory upon which the rule is based is that whenever interest is allowed, either by statute or common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. This apparently favored position of the government in this respect has been declared to be demanded by public policy. The reasons for the rule apply with equal force to a municipal corporation. Sections 1915 and 1916 of the Civil Code regarding interest are held not to apply to the State or any of its subdivisions. The language is general and does not include the State or any of its political subidivisions, as the State is not bound by general words of a statute which would operate to establish a right of action against it. The court says there is no provision made for the payment of interest in the statute under which the action was brought by Ingebretson; nor was there any provision in the Charter of San Diego for the payment of interest on such claims.

The rule in the *Engebretson* case has been reaffirmed by the Supreme Court and the District Court of Appeal of the State of California in the following cases:

Los Angeles Dredging Co. v. City of Long Beach (1930), 210 Cal. 348, 291 Pac. 839;

Reclamation District No. 1500 v. Reclamation Board (Nov. 1925), 197 Cal. 482, 241 Pac. 552;

McNutt v. City of Los Angeles (Oct. 1921), 187 Cal. 245, 201 Pac. 592;

Connecticut General Life Insurance Co. v. State of California (Oct. 1941), 47 Cal. App. 2d 88.

As previously stated in this brief, the case at bar was brought in the District Court on the ground of diversity of citizenship and is governed by the law of the State of California. The foregoing cases, together with the cases cited in the opinions, fully support appellants' contention that in California interest cannot be recovered prior to judgment in this action against a municipality, there being no express statutory authority or contractual provision for recovery of interest.

Accordingly, it was error for the Court to allow recovery of interest in this case. In Finding No. 15 the words "together with interest thereon at the rate of seven per cent (7%) per annum from the first day of May, 1947," should be stricken. [T. of R. p. 92.]

In Conclusion of Law No. 4 the words "with interest thereon at the rate of seven per cent (7%) per annum from the first day of May, 1947, to the date of judgment herein" should be stricken. [T. of R. p. 94.]

In the Judgment the words "together with interest thereon at the rate of seven per cent (7%) per annum from the first day of May, 1947, to the date hereof in the amount of $1,306.21," should be stricken. [T. of R. p. 96.]

Conclusion.

Appellants respectfully submit that the judgment of the District Court should be reversed for the reason that its findings that the lead and copper indexes were intended to be used are clearly erroneous, unsupported by any competent evidence, and a consideration of the entire evidence leaves a definite and firm conviction that a mistake has been committed by the District Court; and that in any event, interest is not recoverable prior to judgment in this action against a municipality.

Respectfully submitted,

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